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**U.S. District Court
Northern District of Ohio (Toledo)
CIVIL DOCKET FOR CASE #: 3:07-cv-01922-JGC
Internal Use Only**

FURminator, Inc. v. Kirk Weaver Enterprises, Inc. et al
Assigned to: Judge James G. Carr
Cause: 15:44 Trademark Infringement

Date Filed: 06/27/2007
Date Terminated: 07/02/2008
Jury Demand: Plaintiff
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

Plaintiff**FURminator, Inc.**

TM Reg. # 2,965,342
3,238,141

represented by **Amy D. Hathaway**
Vorys, Sater, Seymour & Pease -
Columbus
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
614-464-6352
Fax: 614-719-4612
Email: adhathaway@vssp.com
TERMINATED: 11/21/2007
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Winship Read
Vorys, Sater, Seymour & Pease -
Cleveland
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114
216-479-6103
Fax: 216-479-6060
Email: jwread@vssp.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jonathan G. Musch
Thompson Coburn
One US Bank Plaza
St. Louis, MO 63101
314-552-6000
Fax: 314-552-7000
Email: jmusch@thompsoncoburn.com

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Lisa B. Forbes
Vorys, Sater, Seymour & Pease -
Cleveland
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114
216-479-6105
Fax: 216-479-6060
Email: forbeli@vssp.com

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Steven E. Garlock
Thompson Coburn
One US Bank Plaza
St. Louis, MO 63101
314-552-6146
Fax: 314-552-7146
Email: sgarlock@thompsoncoburn.com

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Gayle I. Horwitz
Vorys, Sater, Scymour & Pease -
Cleveland
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114
216-479-6100
Fax: 216-479-6060
Email: gihorwitz@vssp.com

ATTORNEY TO BE NOTICED

V.

Defendant

Kirk Weaver Enterprises, Inc.

represented by **W. David Arnold**
Arnold, Caruso, Green & Belazis
1822 Cherry Street
Toledo, OH 43608
419-241-2200
Fax: 419-255-7623
Email:
wdarnold@arnoldandcaruso.com
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

John Winship Read
(See above for address)

Keith N. Biebelberg
Biebelberg & Martin
374 Millburn Avenue
Millburn, NJ 07041
973-912-9888
Fax: 973-376-6142
ATTORNEY TO BE NOTICED

Defendant

Kirk A. Weaver

represented by **W. David Arnold**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Winship Read
(See above for address)

Keith N. Biebelberg
(See above for address)
ATTORNEY TO BE NOTICED

Counter-Claimant

Kirk Weaver Enterprises, Inc.

represented by **W. David Arnold**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Winship Read
(See above for address)

Keith N. Biebelberg
(See above for address)
ATTORNEY TO BE NOTICED

Counter-Claimant

Kirk A. Weaver

represented by **W. David Arnold**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Winship Read
(See above for address)
ATTORNEY TO BE NOTICED

Keith N. Biebelberg
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter-Defendant**FURminator, Inc.**

represented by **Amy D. Hathaway**
 (See above for address)
TERMINATED: 11/21/2007
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Winship Read
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jonathan G. Musch
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa B. Forbes
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Steven E. Garlock
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Gayle I. Horwitz
 (See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/27/2007	<u>1</u>	Complaint with jury demand <i>Verified Complaint for Immediate, Preliminary and Permanent Injunctive Relief and Damages</i> against all defendants. (Filing fee \$350, receipt number 2529168). Filed by FURminator, Inc. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summons: K. W. Enterpriscs, Inc., # <u>3</u> Summons: Kirk Weaver, # <u>4</u> TO BE FILED SEPARATELY. Exhibit Corporate Disclosure) (Read, John). Modified text on 6/28/2007 (M, C). (Entered: 06/27/2007)
06/27/2007	<u>2</u>	Motion for temporary restraining order <i>and Preliminary Injunctive Relief</i> filed by FURminator, Inc.. (Attachments: # <u>1</u> Proposed Order)(Read, John) (Entered: 06/27/2007)
06/27/2007	<u>3</u>	Memorandum of Law in Support of FURminator, Inc.'s Motion for Temporary Restraining Order and Preliminary Injunction filed by

		FURminator, Inc.. Related document(s) <u>2</u> . (Read, John) Modified on 7/2/2007 to edit and term motion (B, T). (Entered: 06/27/2007)
06/27/2007	<u>4</u>	Notice of Certification of Counsel filed by FURminator, Inc.. Related document(s) <u>3</u> , <u>2</u> .(Read, John) (Entered: 06/27/2007)
06/27/2007	<u>5</u>	Motion for Expedited Discovery filed by FURminator, Inc.. (Attachments: # <u>1</u> Proposed Order)(Read, John) Modified on 7/2/2007 (B, T). (Entered: 06/27/2007)
06/28/2007		(Court only) Utility Event adding attorneys Lisa B. Forbes and Amy D. Hathaway for FURminator, Inc. (M,C) (Entered: 06/28/2007)
06/28/2007		Judge James G. Carr assigned to case. (M,C) (Entered: 06/28/2007)
06/28/2007	<u>6</u>	Corporate Disclosure Statement filed by FURminator, Inc.. (Read, John) (Entered: 06/28/2007)
06/28/2007	<u>7</u>	Summons and Magistrate Consent Form issued to counsel for service upon Kirk Weaver Enterprises, Inc., Kirk A. Weaver. (Attachments: # <u>1</u> Kirk Weaver, # <u>2</u> Magistrate Consent Form). (M,C) (Entered: 06/28/2007)
06/28/2007		Minutes of proceedings [Non document]. Telephone Conference held on 6/28/2007 before Judge James G. Carr. Plaintiff's motion for expedited discovery granted. (Court Reporter Tracy Spore.) (S,AI.) (Entered: 06/28/2007)
06/28/2007		(Court only) Utility Event Terminating Motions. <u>5</u> Motion for Plaintiff FURminator, Inc.'s Motion for Expedited Discovery filed by FURminator, Inc.. (S,AL) (Entered: 06/28/2007)
06/28/2007	<u>8</u>	Notice to take Deposition of <i>Kirk Weaver</i> on <i>Tuesday July 3, 2007 at 9:00 a.m.</i> filed by FURminator, Inc.. (Hathaway, Amy) (Entered: 06/28/2007)
06/28/2007	<u>9</u>	Return of Service Executed upon Kirk Weaver Enterprises Inc., et al. by Defendants' counsel accepted service on the record at the TRO hearing on June 28, 2007 filed by FURminator, Inc. (Forbes, Lisa) (Entered: 06/28/2007)
06/28/2007	<u>10</u>	Return of Service Executed upon Kirk Weaver by Defendants' counsel accepted service on the record at the TRO hearing on June 28, 2007 filed by FURminator, Inc. (Forbes, Lisa) (Entered: 06/28/2007)
07/02/2007		(Court only) Utility Event Terminating Motions. <u>3</u> Motion for Memorandum of Law in Support of FURminator, Inc.'s Motion for Temporary Restraining Order and Preliminary Injunction filed by FURminator, Inc.. (B,T) (Entered: 07/02/2007)
07/06/2007	<u>11</u>	Motion for extension of time until 08/17/2007 to answer complaint and entry of attorney Keith N. Biebelberg filed by all defendants. (Arnold, W) (Entered: 07/06/2007)
07/10/2007		(Court only) Utility Event adding attorney Keith N. Biebelberg for Kirk Weaver Enterprises, Inc. and Kirk A. Weaver. Related document(s) <u>11</u> . (B,T) (Entered: 07/10/2007)

07/11/2007		(Court only) Staff Notes: Attorney Keith N. Biebelberg not admitted to practice in this court. Email sent to attorney re: LR 83.5. (G,CA) (Entered: 07/11/2007)
07/13/2007	<u>12</u>	Status Report filed by FURminator, Inc.. (Attachments: # <u>1</u> Exhibit A)(Read, John) (Entered: 07/13/2007)
07/17/2007	<u>13</u>	Marginal Order granting <u>11</u> Motion for Extension of Time to Answer: Kirk Weaver Enterprises, Inc. and Kirk A. Weaver's answer due 8/17/2007. Signed by Judge James G. Carr on 7/13/2007.(S,AL) (Entered: 07/17/2007)
07/18/2007	<u>14</u>	Motion for attorney Jonathan G. Musch to Appear Pro Hac Vice Filing fee 100, receipt number 2556711. filed by FURminator, Inc.. (Attachments: # <u>1</u> Exhibit 1)(Hathaway, Amy) (Entered: 07/18/2007)
07/18/2007	<u>15</u>	Motion for attorney Steven E. Garlock to Appear Pro Hac Vice Filing fee 100, receipt number 2556721. filed by FURminator, Inc.. (Attachments: # <u>1</u> Exhibit 1)(Hathaway, Amy) (Entered: 07/18/2007)
07/20/2007	<u>16</u>	Marginal Order granting Motion for appearance pro hac vice by attorney Jonathan G. Musch for FURminator, Inc. (Related Doc # <u>14</u>). Signed by Judge James G. Carr on 7/20/2007.(S,AL) (Entered: 07/20/2007)
07/20/2007	<u>17</u>	Marginal Order granting Motion for appearance pro hac vice by attorney Steven E. Garlock for FURminator, Inc. (Related Doc # <u>15</u>). Signed by Judge James G. Carr on 7/20/2007.(S,AL) (Entered: 07/20/2007)
08/13/2007	<u>18</u>	Motion for Entry of Consent Order filed by FURminator, Inc.. (Attachments: # <u>1</u> Exhibit 1# <u>2</u> Exhibit 2)(Read, John) (Entered: 08/13/2007)
08/16/2007	<u>19</u>	Answer, Counterclaim against FURminator, Inc. filed by all defendants. (Arnold, W.) (Entered: 08/16/2007)
08/16/2007		(Court only) Utility Event adding attorney W. David Arnold and Keith N. Biebelberg for Kirk Weaver Enterprises, Inc.,Kirk A. Weaver. Related document(s) <u>19</u> . (G,D) (Entered: 08/20/2007)
08/20/2007	<u>20</u>	Notice of Service of first set of interrogatories and first notice to produce documents filed by all defendants. (Arnold, W.) Modified on 8/20/2007 (G, D). (Entered: 08/20/2007)
08/27/2007	<u>21</u>	Order of Pretrial Conference held on 8/23/2007. Clerk to endorse signature of undersigned on Consent Order submitted 8/13/07 and enter same. Discovery due by 5/1/2008. Dispositive Motions due by 2/1/2008; opposition/counter motion due 2/21/08; reply/opposition due 3/5/08; reply due 3/15/08. Settlement Conference set for 5/12/2008 at 2:00 PM. Jury Trial set for 5/27/2008 at 1:30 PM before Hon. James G. Carr with Voir Dire set for 5/27/2008 at 9:00AM before Magistrate Judge Vernelis K. Armstrong. Signed by Judge James G. Carr on 8/27/2007.(S,AL) (Entered: 08/27/2007)
08/27/2007	<u>22</u>	Consent Order (see order for full details). Signed by Judge James G. Carr on 8/24/2007.(S,AL) (Entered: 08/27/2007)
09/05/2007	<u>23</u>	Answer to Defendants' Counterclaim filed by FURminator, Inc.. (Hathaway,

		Amy) Modified on 9/14/2007 (G, D). (Entered: 09/05/2007)
09/05/2007	<u>24</u>	Amended Notice of Service of answer to defendants' counterclaim filed by FURminator, Inc.. Related document(s) <u>23</u> .(Hathaway, Amy) Modified on 9/14/2007 (G, D). (Entered: 09/05/2007)
10/05/2007	<u>25</u>	Motion for attorney Keith N. Biebelberg to Appear Pro Hac Vice filed by Kirk Weaver Enterprises, Inc., Kirk A. Weaver.(Filing fee \$100 paid; receipt number 34660002103) (A,P) (Entered: 10/05/2007)
10/15/2007	<u>26</u>	Marginal Order granting Keith N. Biebelberg's motion to Appear Pro Hac Vice for Kirk Weaver Enterprises, Inc., Kirk A. Weaver. (Related Doc # <u>25</u>). Signed by Judge James G. Carr on 10/11/2007.(S,AL) (Entered: 10/15/2007)
11/12/2007	<u>27</u>	Joint Motion for protective order filed by Plaintiff FURminator, Inc., Kirk Weaver Enterprises, Inc., Kirk A. Weaver, Kirk Weaver Enterprises, Inc., Kirk A. Weaver, Counter-Defendant FURminator, Inc.. (Read, John) (Entered: 11/12/2007)
11/21/2007	<u>28</u>	Marginal Order granting the parties joint motion for protective order (Related Doc # <u>27</u>). Signed by Judge James G. Carr on 11/19/2007.(S,AL) (Entered: 11/21/2007)
11/21/2007		(Court only) Staff Notes: Counsel going to file revised protective order. Previously file proposed protective order is missing a page. (S,AL) (Entered: 11/21/2007)
11/21/2007	<u>29</u>	Notice of Substitution of Counsel removing attorney Aimee D. Hathaway and adding attorney Gayle I. Horwitz filed by on behalf of FURminator, Inc.. (Horwitz, Gayle) (Entered: 11/21/2007)
12/18/2007	<u>30</u>	Motion for partial summary judgment filed by Plaintiff FURminator, Inc.. (Forbes, Lisa) (Entered: 12/18/2007)
12/18/2007	<u>31</u>	Memorandum In Support of <u>30</u> Motion for partial summary judgment filed by FURminator, Inc.. (Attachments: # <u>1</u> Exhibit No. 1, # <u>2</u> Exhibit No. 2, # <u>3</u> Exhibit No. 3, # <u>4</u> Exhibit No. 4)(Forbes, Lisa) (Entered: 12/18/2007)
01/10/2008	<u>32</u>	Motion for extension of response to motion for partial summary judgment until January 28, 2008 filed by Kirk Weaver Enterprises, Inc., Kirk A. Weaver, Kirk Weaver Enterprises, Inc., Kirk A. Weaver. (Arnold, W.) (Entered: 01/10/2008)
01/24/2008	<u>33</u>	Marginal Order granting <u>32</u> defendant's motion for an extension of time until 1/28/08 to respond to the partial motion for summary judgment; reply due 2/15/08. Signed by Judge James G. Carr on 1/16/2008.(S,AL) (Entered: 01/24/2008)
01/28/2008	<u>34</u>	Opposition to <u>30</u> Motion for partial summary judgment filed by Kirk Weaver Enterprises, Inc., Kirk A. Weaver. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Affidavit, # <u>3</u> Affidavit, # <u>4</u> Pleading)(Arnold, W.) (Entered: 01/28/2008)
01/31/2008		(Court only) Utility Event Terminating Motions. <u>2</u> Motion for temporary

		restraining order <i>and Preliminary Injunctive Relief</i> filed by FURminator, Inc., <u>18 Motion</u> for Entry of Consent Order filed by FURminator, Inc.. (S,AL) (Entered: 01/31/2008)
02/15/2008	<u>35</u>	Reply Brief in support of <u>30 Motion</u> for partial summary judgment filed by FURminator, Inc.. (Forbes, Lisa) Modified on 2/19/2008 (G,Di). (Entered: 02/15/2008)
02/15/2008	<u>36</u>	Motion for oral argument filed by Plaintiff FURminator, Inc.. Related document(s) <u>35</u> . (Forbes, Lisa) (Entered: 02/15/2008)
04/07/2008	<u>37</u>	Order : FURminator's motion for partial summary judgment is granted; consent decree previously entered to remain in full force and effect pending entry of permanent injunction; plaintiff to submit proposed injunction by April 15, 2008. FURminator's motion for oral argument is denied as moot. (Related Doc # <u>30</u>); moot Motion for oral argument (Related Doc # <u>36</u>). Signed by Judge James G. Carr on 4/7/2008. (S,AL) (Entered: 04/07/2008)
04/15/2008	<u>38</u>	Notice of Filing Proposed Permanent Injunction filed by FURminator, Inc.. (Attachments: # <u>1</u> Proposed Permanent Injunction)Related document(s) <u>37</u> . (Forbes, Lisa) Modified on 4/17/2008 (G,Di). (Entered: 04/15/2008)
05/01/2008	<u>39</u>	Motion for extension of time until May 9, 2008 to respond to permanent injunction filed by Kirk Weaver Enterprises, Inc., Kirk A. Weaver, Kirk Weaver Enterprises, Inc., Kirk A. Weaver. (Arnold, W.) (Entered: 05/01/2008)
05/07/2008	<u>40</u>	Order: Status conference was held 5/5/08 before Judge James G. Carr. Parties having indicated that case may be resolved, pretrial conference and trial dates previously set are vacated sine die. Defendants motion for extension of time for response to proposed permanent injunction is granted; response is due 6/2/08. Status reports to be filed, if needed, by 6/2/08. Related document [#39]. (S,JM) (Entered: 05/07/2008)
06/02/2008	<u>41</u>	Notice of Filing Consent Order filed by FURminator, Inc.. (Attachments: # <u>1</u> Proposed Order Consent Order)(Forbes, Lisa) (Entered: 06/02/2008)
07/02/2008	<u>42</u>	Consent Judgment (see order for full details). Judge James G. Carr on 7/2/2008. (S,AL) (Entered: 07/02/2008)

1. Plaintiff FURminator, Inc. ("FURminator") is a corporation organized and existing under the laws of the State of Missouri. FURminator specializes in developing and selling grooming products for cats and dogs known as the "FURminator Professional deShedding Tool." FURminator's corporate headquarters are located in St. Louis, Missouri.

2. Defendant Weaver Enterprises is an Ohio corporation with its principal place of business in McClure, Ohio. Upon information and belief, Weaver Enterprises sells its products at a variety of locations, including trade shows and/ or flea markets.

3. Defendant Kirk A. Weaver is an Ohio resident and, on information and belief, is the owner of Weaver Enterprises.

JURISDICTION

4. This is a civil action for trademark infringement under the Lanham Act, Title 15 U.S.C. § 1051 *et seq.*, the Ohio Deceptive Trade Practices Act, Ohio Revised Code § 4165.01 *et seq.* and for an accounting. This Court has subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. § § 1331, 1332, and 1338 and over the state claims pursuant to 28 U.S.C. § 1367.

5. This Court has jurisdiction over Weaver by virtue of their presence in Henry County, Ohio, their receipt of service of process in this state, and/or because the claims for relief asserted herein arise from their transaction of business and other acts in Ohio.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391 and because a substantial part of the events giving rise to plaintiff's claims has occurred in this district.

FACTS COMMON TO ALL CLAIMS

7. FURminator's grooming tools range in price from \$34.95 to \$69.95. The grooming product at issue in this litigation is the Small Blue Tool (the "Small Blue Tool"). The Small Blue Tool is sold at more than 7,500 retail outlets in the United States. The suggested retail price for a Small Blue Tool is \$34.95. Typically, FURminator sells the Small Blue Tool (and all its products) at wholesale prices either to authorized distributors or directly to certain national big box pet stores like PetSmart and PetCo. The authorized distributors in turn sell the Small Blue

Tool and FURminator's other products to retailers, groomers, and veterinarians, among others, who use the products themselves or sell to end users.

8. The Small Blue Tool is a patented pet grooming tool that comprises a handle connected to a toothed blade that is pulled through a pet's coat. The handle is held by the user of the product so that the user does not need to personally hold the stainless steel Small Blue Tool edge as the toothed blade edge contacts the pet. Teeth on the blade remove the dead undercoat and loose hair from pets which dramatically reduces shedding and prevents the pets from shedding throughout the pet owner's household.

9. FURminator has used the FURminator Marks, Reg. Nos. 2965342 (the name "FURMINATOR"®) and 3238141 (the name FURMINATOR® and design) in commerce since at least as early as November 18, 2002 and August 17, 2005 respectively (collectively the "FURminator Marks"). Both marks have been registered with the United States Patent and Trademark Office. Copies of Reg. Nos. 3238141 and 2965342 are attached hereto as Exhibit 1.

10. FURminator has earned an excellent reputation in the pet-specialty industry due to its high-quality merchandise, its premium price positioning (\$34.95—\$69.95), its highly successful marketing efforts directed at its target consumers, its commitment to pet safety, and its four (4) year history in the pet-specialty industry. In fiscal years 2003-2006, FURminator spent more than \$1 million on marketing and advertising in the United States and Canada including advertising in trade journals and targeted pet magazines like Dog Fancy, advertising on the internet on sites such as AnimalPlanet.com, and placing merchandising displays in pet stores, such as televisions playing a video showing the FURminator products in use.

11. As a result of FURminator's extensive marketing, advertising, and sales in conjunction with the FURminator Marks and name, FURminator has generated substantial goodwill for itself in conjunction with the FURminator Marks and name.

12. In approximately June 2006, FURminator's manufacturer produced a batch of approximately 69,000 defective Small Blue Tools that were sent to a warehouse in Connecticut. The Small Blue Tools were defective because the metal blade or comb portion was improperly manufactured, leaving it inappropriately dull and, thus, ineffective. The defective tools are potentially harmful to the pets on which they are used. The defective Small Blue Tools are packaged in a polybag. Both the Small Blue Tools and the packaging bear the FURminator Marks.

13. Upon learning of the defective Small Blue Tools, FURminator took extensive steps to prevent them from entering the stream of commerce. FURminator entered into a contract with its Connecticut fulfillment company, Fosdick Corporation ("Fosdick"), to destroy the defective tools and their packaging. FURminator made it clear to Fosdick that the units must be destroyed and could not be released to the public. Fosdick, in turn, entered into an agreement with Willimantic Waste Paper Company, Inc. ("Willimantic") whereby Willimantic agreed to destroy the defective tools and their packaging.

14. On December 20, 2006, Willimantic sent Fosdick a letter certifying that it had destroyed all of the defective Small Blue Tools. (See T. DeVivo Letter dated December 20, 2006, attached hereto as Exhibit 2).

15. Despite this certification, Willimantic did not destroy the defective Small Blue Tools but instead sold them.

16. FURminator later learned that the defective Small Blue Tools were being sold at flea markets, pet trade shows, specialty pet retailers and over the internet across the United States and Canada for prices well below wholesale.

Nostalgic Images, Inc.'s Improper Sale of Counterfeit Small Blue Tools

17. FURminator's investigation to uncover the source of the defective Small Blue Tools led FURminator to Nostalgic Images, Inc. ("Nostalgic"). Nostalgic purchased a large quantity of the defective Small Blue Tools and, in turn, sold them to a number of customers including Weaver, who are, in turn, selling them to end users who are putting the defective Small Blue Tools to use on their pets.

18. On or about May 15, 2007, FURminator filed for a Temporary Restraining Order against Nostalgic to require Nostalgic to cease its sales of defective Small Blue Tools and provide information regarding Nostalgic's sales. The Honorable Judge Katz of the Northern District of Ohio granted FURminator's motion on May 16, 2007. The information provided by Nostalgic implicated sales by Nostalgic to Weaver at a price of approximately \$ 1.50 per tool.

Kirk Weaver Enterprises' Improper Receipt and Sale of the Counterfeit Small Blue Tools

19. FURminator contacted Weaver on May 25, 2007. (See S. Garlock Letter, dated May 25, 2007, attached hereto as Exhibit 3). At that time, FURminator requested that Weaver cease selling the defective Small Blue Tools, (confirm the same in writing,) and provide information regarding his current inventory of defective Small Blue Tools, how Weaver obtained the small blue tools, and information regarding his sales of the defective Small Blue Tools. This information is a necessary precursor to FURminator making arrangements for recovery of the defective products.

20. Weaver assured FURminator in writing that it would cease sales of the counterfeit Small Blue Tools. (See K. Weaver email, dated May 21, 2007, attached hereto as Exhibit 4). Weaver, however, requested that FURminator recover the defective Small Blue Tools at a price that would give him a profit. *Id.*

21. Weaver initially claimed to have stopped selling the defective Small Blue Tools, but has thus far refused to provide the information requested. *Id.* Subsequent to this initial contact, FURminator offered to recover the defective Small Blue Tools at cost, contingent upon Weaver providing the information necessary to substantiate the sale and appropriate costs incurred. (See S. Garlock Letter, dated June 18, 2007, attached hereto as Exhibit 5). FURminator's June 18, 2007 letter provided a copy of FURminator's agreement with its manufacturer to replace the defective tools and a picture comparison of an acceptable tool and a defective tool. *Id.* Weaver still refuses to provide the information requested.

22. Rather, on June 20, 2007, after having been apprised of the defective nature of the tools and agreeing not to sell any product, Weaver demanded permission from FURminator to permit inspection of the tools by an "expert." (See K. Biebelberg Letter, dated June 20, 2007, attached hereto as Exhibit 6). The letter from Weaver's attorney indicated that if FURminator was unwilling to permit Weaver several additional weeks for testing, he would instruct his client to commence sales of the product, selling "all product this afternoon." *Id.*

23. Weaver followed-up this correspondence with a letter dated June 21, 2007, wherein Weaver claimed that the tools he purchased are identical to authorized tools. (See K. Biebelberg Letter, dated June 21, 2007, attached hereto as Exhibit 7). In this letter, Weaver's attorney reiterated his threat to authorize his client to immediately sell his remaining inventory of tools.

Id. Thus, Weaver has threatened to resume selling, and, in fact may have already resumed selling the defective Small Blue Tools without FURminator's permission.

The Effect of the Defective Small Blue Tools On the Marketplace

24. Sales of the defective Small Blue Tools has led to actual customer confusion. A retail customer purchased a Small Blue Tool at a flea market for only \$6.00 and contacted FURminator to complain about why the company would sell its product so cheaply in one channel but more expensively in others. The retail customer was confused, thinking that FURminator authorized the sale of the defective Small Blue Tool, when in fact FURminator had taken steps to keep that product from ever entering the stream of commerce.

25. Sales of the defective Small Blue Tools have damaged FURminator's goodwill. FURminator received at least one complaint from a retail customer about the defective Small Blue Tools, claiming that the performance was not on par with expectations. This customer demanded FURminator honor its money-back guarantee.

26. FURminator did not authorize the sale of the defective Small Blue Tools to any individual or entity. To the contrary, FURminator took prompt and affirmative steps to ensure that the defective Small Blue Tools were destroyed.

27. To protect FURminator's mark and the potential safety of the public's pets, given Weaver's threatened or actual resumed sale of the defective tools, and because Weaver has repeatedly refused to provide the information, an Order requiring Weaver to cease selling the defective tools and to produce the requested information is necessary.

28. FURminator attempted to disassociate itself from the defective Small Blue Tools through its extensive efforts to remove the defective tools from the stream of commerce to protect the public's pets and its relationships with its distributors and retailers from a potentially ineffective

product. This disassociation is critical to FURminator's ability to preserve consumer goodwill towards its products and its own good name and reputation.

29. FURminator needs the requested information to protect FURminator's good will and good name.

30. Weaver's refusal to provide FURminator with the information about the number of defective Small Blue Tools it obtained, the number sold to each of its customers and the identity of and contact information for those customers, despite FURminator's repeated and reasonable requests, has irreparably harmed, and will continue to irreparably harm, FURminator's reputation and potentially harm the pets on which the defective Small Blue Tools are used. The sale of defective Small Blue Tools is harming the good name of FURminator and the goodwill built up by FURminator over the years. Weaver is causing the public to believe that FURminator endorses the defective Small Blue Tools and is preventing FURminator from protecting its good reputation and the goodwill associated with its mark and name.

31. The information sought and the order requested is urgently needed in order to allow FURminator to protect its goodwill and reputation.

32. FURminator has no adequate remedy at law.

FIRST CLAIM FOR RELIEF

Federal Unfair Competition 15 U.S.C. 1125(a)

33. FURminator incorporates the allegations set forth in preceding paragraphs as if fully restated here.

34. FURminator is the owner of the FURminator Marks and has the exclusive right to use the marks on or in connection with the Small Blue Tools, among other goods. Through continuous

use of the FURminator Marks, the marks have become associated in the minds of consumers with FURminator and its business.

35. FURminator has never authorized Weaver to sell the defective Small Blue Tools.

36. Weaver's selling the defective Small Blue Tools is likely to cause confusion, to cause mistake, and/or to deceive consumers as to the affiliation, connection, and/or association of FURminator with the defective Small Blue Tools as to the origin, sponsorship, and/or approval of defective Small Blue Tools, all to the detriment of FURminator. This unlicensed use and infringement violates FURminator's rights pursuant to, *inter alia*, 15 U.S.C. § 1125(a).

37. Weaver's sales of the defective Small Blue Tools demonstrates that Weaver has means to promote the sale of the defective Small Blue Tools. Weaver's threat to begin selling tools again, even after being informed of the counterfeit nature of the tools, indicates that its contact is willful.

38. As a proximate result of Weaver's willful actions and willful inactions as set forth herein, FURminator has suffered and will continue to suffer irreparable harm to its business and its goodwill. Also, given the intentional nature of Weaver's actions in selling and threatening to sell the defective Small Blue Tools and Weaver's failure to produce the requested information, FURminator is entitled to recover augmented damages in an amount treble its actual damages and its attorney's fees under 15 U.S.C. § 1117 on the grounds of the exceptional nature of this case.

39. A majority, if not all, of the harm to FURminator is irreparable.

40. Weaver's threat to resume willful sales of the defective Small Blue Tools has resulted, and will continue to result, in harm to FURminator's reputation and goodwill. Unless ordered to cease selling the defective tools and to produce the information sought, FURminator will

continue to suffer irreparable injury. In addition, the harm to the goodwill and reputation suffered by FURminator is difficult, if not impossible, to quantify and/or ascertain. Thus, FURminator has no adequate remedy at law.

SECOND CLAIM FOR RELIEF

Ohio Deceptive Trade Practices Acts §§4165.01 *et seq.*

41. FURminator incorporates the allegations set forth in preceding paragraphs as if fully restated here.

42. Weaver's unauthorized selling of the defective Small Blue Tools causes a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, affiliation, connection, and/or association with or by FURminator in connection with the defective Small Blue Tools. In fact, FURminator has disassociated itself from the defective Small Blue Tools, having taken reasonable steps to ensure their destruction.

43. FURminator has been and will continue to be damaged by Weaver's willful actions and willful inactions unless Weaver is enjoined from the conduct complained of herein and ordered to produce the requested information.

44. Pursuant to Ohio Revised Code §4165.03, FURminator is entitled to an injunction, actual damages, and its attorney's fees, as Weaver has willfully engaged in the unlawful trade practices complained of herein.

THIRD CLAIM FOR RELIEF

Accounting

45. FURminator incorporates the allegations set forth in preceding paragraphs as if fully restated here.

46. FURminator has a right to, and needs, Weaver's customer and financial records to allow FURminator to ascertain how many defective tools Wagner sold, to whom, and at what price.

47. As the sellers of the defective Small Blue Tools, the financial information sought is peculiarly within Weaver's knowledge.

48. FURminator has requested the customer information from the Weaver. Weaver has failed to produce it.

49. FURminator needs this information to ensure that Weaver does not improperly benefit from their illegal behavior and to protect FURminator's goodwill and reputation.

50. Weaver's selling the Small Blue tools to the public establishes a fiduciary and/or trust relationship among FURminator and Weaver such that FURminator is entitled to the financial and customer records.

51. Available legal remedies are inadequate to completely compensate FURminator for the harm caused to it by Weaver.

WHEREFORE, FURminator asks this Court for an award of temporary, preliminary and permanent injunctive relief, and for an award of damages, as follows:

A. An award enjoining Weaver from further sales of FURminator products, requiring Weaver to return to FURminator any Small Blue Tools presently in the possession of Weaver so that all such tools can be destroyed, and requiring Weaver to provide to FURminator:

(a) a complete list of and/or documents identifying every individual and/or entity to whom Weaver sold the FURminator Small Blue Tool, including the name, address and any and all contact information for such customers, the number of Small Blue Tools sold to each customer, and the price of the Small Blue Tools sold to each customer;

(b) a complete list of and/or documents identifying the number of defective Small Blue Tools Weaver obtained; and

(c) a complete list of and/or documents identifying the number of defective Small Blue Tools still in the possession of Weaver;

B. An accounting of all sales of and profits earned by Weaver in the illegal and improper sale of the defective Small Blue Tools;

C. An award of damages, including the costs FURminator incurs in recovering the Small Blue Tools, trebled;

D. Attorneys' fees and costs incurred in the pursuit of this action; and

E. Such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/John Winship Read (by Amy D. Hathaway per authority)

John Winship Read (0030827)

Lisa Babish Forbes (0060105)

VORYS, SATER, SEYMOUR AND PEASE LLP

2100 One Cleveland Center

1375 East Ninth Street

Cleveland, Ohio 44114-1724

Telephone: (216) 479-6105

Facsimile: (216) 479-6060

E-mail: lbforbes@vssp.com

jwread@vssp.com

Amy D. Hathaway (0075169)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

Columbus, Ohio 43215

Telephone: (614) 464-6352


Facsimile: (614) 719-4612

E-mail: adhathaway@vssp.com


Attorneys for Plaintiff, FURminator, Inc.

VERIFICATION

I, Timothy Petsch, the Vice-President of Marketing & Sales of FURminator, Inc., have read the foregoing Verified Complaint and state and affirm, under penalty of perjury, that all allegations are true and correct to the best of my knowledge as of this day of June 27th, 2007.


Timothy Petsch
VP, Marketing and Sales
FURminator, Inc.

Signed and sworn before me and subscribed in my presence, this 27th day of June, 2007.


Notary Public



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Verified Complaint* was served via regular first class United States mail, postage prepaid, to the individuals and entities listed below, on the 27th day of June, 2007 at the following addresses:

Kirk Weaver Enterprises, Inc.
L-711 State Route 65
McClure, OH 43534

and

Kirk Weaver
L-711 State Route 65
McClure, OH 43534

and via Federal Express next day delivery to

Keith Biebelberg, Esq.
Jay Nimaroff, Esq.
Biebelberg & Martin
374 Millburn Ave.
Millburn, NJ 07041-1358
Counsel for Defendants

/s/John Winship Read (by Amy D. Hathaway per authority)
An Attorney for Plaintiff, FURminator, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FURMINATOR INC.,

Plaintiff,

v.

KIRK WEAVER ENTERPRISES,
INC., and KIRK A. WEAVER,

Defendants.

CASE NO. 07-CV-1922

CHIEF JUDGE CARR

CONSENT ORDER

By stipulation of the parties, the Court hereby enters the following order:

1. In recognition of the parties settlement of the current dispute, the Court takes notice of the following admissions by Defendants Kirk Weaver Enterprises, Inc. and Kirk A. Weaver (collectively "Defendants"). The Court further recognizes that on April 7, 2008, after consideration of the briefs and all other matters presented to the Court, this Court granted FURminator's motion for partial summary judgment as to its Lanham Act (Count I) and State unfair competition claims (Count II). [Doc. 30].
2. The Court acknowledges that Defendants admit the following
 - a. Defendants purchased a total of 25,700 small blue FURminator grooming tools ("FURminator Tools") from Nostalgic Images, Inc., at a cost of \$1.50/tool.
 - b. Of the 25,700 FURminator tools purchased by Defendants, Defendants sold 7,789 FURminator Tools prior to being enjoined by this Court. The average sale price of such tools was at least \$8.00/tool. Defendants sold the FURminator Tools, which FURminator determined to be defective,

at a substantially lower price than FURminator's suggested retail price of \$34.95/tool.

- c. Given the close similarity between the tools offered by FURminator and the defective FURminator Tools sold by Defendants, consumers who purchased FURminator Tools sold by Defendants likely intended to purchase a genuine FURminator tool and likely purchased tools from the Defendant under the belief that they were genuine FURminator products.
- d. Defendants' sale of FURminator Tools was done, given the price and quantity of the FURminator tools purchased from Nostalgic Images, Inc., with full knowledge of the suspicious origin of those goods.
- e. That the Court has found that Defendants attempted to willfully profit off of the malfeasance of an intermediary by selling FURminator Tools with full knowledge of the suspicious origin of those tools.
- f. Based on information provided by FURminator, Defendants' sales of FURminator Tools resulted in combined lost sales and lost goodwill (in the form of sales of defective FURminator Tools to FURminator consumers) of at least \$100,000.00 in actual damages. Defendant admits that this is a valid calculation of FURminator's actual damages.
- g. FURminator also claims that it has expended attorneys fees in the amount of \$112,642.00 and that the costs associated with this action are \$1,806.75.
- h. Based on the Court's April 7, 2008 Order, FURminator is the prevailing party in this lawsuit and based on a finding of infringement under the Lanham Act, would be entitled to damages.

i. Treble damages may be available to the Court in this matter.

3. The Court acknowledges that Defendants also stipulate to the following points of law:

a. The language of the Lanham Act is plain concerning FURminator's entitlement to damages. 15 U.S.C. § 1117 provides:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office ... shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, ... subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount.

15 U.S.C.A. § 1117(a) (emphasis added).

b. The fact that an infringer may not have profited from an infringement does not preclude an award of damages under the Lanham Act. *See Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 621 (9th Cir. 1993).

c. Section 1117 also provides for the trebling of damages, stating "the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount." 15 U.S.C. § 1117(a).

d. This statute grants a district court a great deal of discretion in fashioning an appropriate remedy in cases of trademark infringement, including awarding trebled damages. *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997) (citing *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 917 (Fed. Cir. 1984).

- e. The Lanham Act also permits recovery of attorneys fees in "exceptional circumstances" for the prevailing party. 15 U.S.C. § 1117(a).
- f. Within the meaning of Section 1117, an exceptional case means one where the infringement was "malicious, fraudulent, wilful, or deliberate." *Audi AG v. D'Amato*, 469 F.3d 534, 551 (6th Cir. 2006) (quoting *Eagles, Ltd. v. Am. Eagle Found.*, 356 F.3d 724, 728 (6th Cir. 2004).

4. I find that, per the parties stipulations, FURminator is entitled to an award of damages in the amount of \$101,806.75 in actual damages sustained and costs under 15 U.S.C. § 1117(a). Since trebled damages are appropriate in this case, FURminator's damages amount to \$301,806.75.

5. Due to the willful nature of Defendants' sales, this is exceptional. Pursuant to the parties' stipulations, I find that FURminator is entitled to \$112,642.00 in attorneys fees pursuant to 15 U.S.C. § 1117(a).

6. Defendants are also henceforth prohibited from any further sales of FURminator grooming tools purchased from Nostalgic Images ("Nostalgic Images Tools").

7. All claims remaining in this case, namely Count III of FURminator's Complaint and Count I and II of Defendants' counterclaims, are dismissed *with prejudice*.

8. This Court shall retain jurisdiction to enforce this Order.

SO STIPULATED:

DATED: June 2, 2008

THOMPSON COBURN LLP

By: /s/ Steven E. Garlock
Steven E. Garlock, MO Bar #38346
Jonathan G. Musch, MO Bar #55200
One US Bank Plaza
St. Louis, MO 63101
Tel: (314) 552-6000
FAX: (314) 552-7000
sgarlock@thompsoncoburn.com
jmusch@thompsoncoburn.com

and

John Winship Read, Esq.
Lisa Babish Forbes, Esq.
Vorys, Sater, Seymour and Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114-1724

Attorneys for Plaintiff FURminator, Inc.

DATED: June 2, 2008

ARNOLD, CARUSO, GREEN & BELAZIS,
LTD.

By: 

W. David Arnold, Esq.
1822 Cherry Street
Toledo, OH 43608-2801

Attorney for Defendants

IT IS SO ORDERED.

Dated: 7/2/08

s/ James G. Carr
Honorable Chief Judge James G. Carr
United States District Court